

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

X

In the Matter of the Application of NATIONAL :  
UNION FIRE INSURANCE COMPANY OF :  
PITTSBURGH, PA, on behalf of itself and each :  
of the related insurers that provided coverage to : 07 CV 3355 (LTS)  
respondent,  
:

Petitioner,

For an Order Appointing an Arbitrator in an :  
Arbitration Proceeding

-against-

CRUM STAFFING, INC., CRUM STAFFING :  
II, INC., CRUM RESOURCES, INC., AND :  
CRUM RESOURCES II, INC., D/B/A/ CRUM :  
SERVICES, INC.,  
:

Respondents.

**DECLARATION OF SCOTT R.  
EMERY IN OPPOSITION TO  
PETITIONER'S APPLICATION  
FOR THE APPOINTMENT OF A  
PARTY-ABRITRATOR**

X

SCOTT R. EMERY, pursuant to 28 U.S.C. § 1746, declares the following:

1. I am an attorney admitted to practice before this Court and am a member of Lynch Daskal Emery LLP, attorneys for Respondents Crum Staffing, Inc., Crum Staffing II, Inc., Crum Resources, Inc., and Crum Resources II, Inc., d/b/a/ Crum Services, Inc. (together, "Crum"). I respectfully submit this declaration in opposition to Petitioner's application for the appointment of a party-arbitrator for Crum.

2. Attached as Exhibit A is a copy of Search for Arbitrators web pages from <http://www.arias-us.org>.

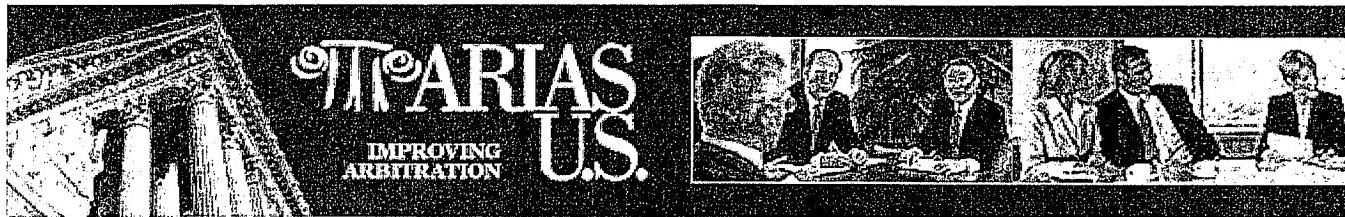
3. Attached as Exhibit B is a copy of *National Union Fire Ins. Co. of Pittsburgh, PA v. Holt Cargo Systems, Inc.*, No. 99 Civ. 3699, 2000 WL328802 (S.D.N.Y. March 28, 2000).

4. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York  
May 9, 2007

  
SCOTT R. EMERY



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## Search for Arbitrators

The ARIAS arbitrator search system allows you to search among our 321 Certified Arbitrators basis of their location, name, current company and/or past experience.

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To search by experience, check the boxes that specify the background or experience area resulting list will provide the names of arbitrators who meet ALL of the criteria.

If the list has too many or too few names, go back and adjust the specifications to broaden the scope.

<b>State/Country</b>	<b>City</b>	<input type="button" value="RUN"/>
United States	<input type="text"/> Any <input type="button" value="..."/>	
<b>First Name*</b>	<b>Last Name*</b>	<b>Current Employer*</b>

<b>Insurance Company Officer</b>	<input type="checkbox"/> ARIAS-U.S. Umpire List
<input type="checkbox"/> Active	<b>Mediation Experience</b>
<input checked="" type="checkbox"/> Former/Retired	<input type="checkbox"/> As Mediator <input type="checkbox"/> As Counsel
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<input type="checkbox"/> Former/Retired	<input type="checkbox"/> Actuary <input type="checkbox"/> Legal Department
<b>Lloyds</b>	<input type="checkbox"/> Underwriter <input type="checkbox"/> Finance/Accounting Department
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### Experience Keywords

- Accident & Health
- Agricultural
- Alternative Risk/Finite Risk/Self Insurance
- Antitrust
- Architects & Engineers
- Asbestos
- Audit
- Automobile Liability/Property
- Aviation
- Captives/Risk Retention Groups

Blue = Insurance   Gray =

- Financial Guarantee
- Intellectual Property
- Libel/Slander/Media Liability
- Life
- Mergers & Acquisitions
- MGA/MGU
- Ocean Marine
- Personal Lines
- Political Risk
- Premium Financing

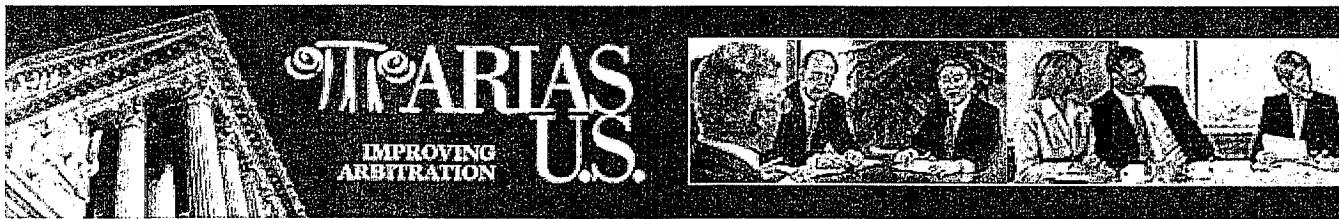
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| <input type="checkbox"/> <input type="checkbox"/> Commercial Liability           | <input type="checkbox"/> <input type="checkbox"/> Product/Consumer Warranties       |
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| <input type="checkbox"/> <input type="checkbox"/> Commutations                   | <input type="checkbox"/> <input type="checkbox"/> Professional Liability/Errors & I |
| <input type="checkbox"/> <input type="checkbox"/> Construction Defects           | <input type="checkbox"/> <input type="checkbox"/> Receivership                      |
| <input type="checkbox"/> <input type="checkbox"/> Contract Wording               | <input type="checkbox"/> <input type="checkbox"/> Regulatory/Licensing              |
| <input type="checkbox"/> <input type="checkbox"/> Directors & Officers           | <input type="checkbox"/> <input type="checkbox"/> Retrospective Rating              |
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	<a href="#">David V. Axene</a>	Murrieta, CA	Axene Health Partners
	<a href="#">Christine E. Bancheri</a>	Wenham, MA	Self-employed
	<a href="#">Nasri H. Barakat</a>	New York, NY	II&RCS, Inc., (Interna
	<a href="#">Linda Martin Barber</a>	Lawrenceville, NJ	Navigant Consulting, I
	<a href="#">Clive A. R. Becker-Jones</a>	Bedford, NH	Gleneagle Managemer
	<a href="#">Peter H. Bickford</a>	New York, NY	Self-employed
	<a href="#">Katherine Lee Billingham</a>	Indianapolis, IN	Katherine L. Billingham
	<a href="#">John H. Binning</a>	Lincoln, NE	Rembolt Ludtke LLP
	<a href="#">William K. Borland</a>	Chicago, IL	Self-employed
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	<a href="#">Peter C. Clemente</a>	New York, NY	Clemente Consulting S
	<a href="#">Martin B. Cohen</a>	Swampscott, MA	Martin B. Cohen Consu
	<a href="#">John D. Cole</a>	Washington, DC	Wiley Rein LLP
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<b>Richard C. Franklin</b>	Glenmoore, PA	Self-employed
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<b>William D. Hager</b>	Boca Raton, FL	Insurance Metrics Cor
<b>Robert M. Hall</b>	Rockport, ME	Self-employed
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		Insurance Arbitration.
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<b>Joel D. Klaassen</b>	Weston, CT	Centre Partners LLC
<b>Floyd H. Knowlton</b>	Rogersville, TN	Self-employed
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<b>Y. John Lee</b>	Greenville, SC	Hewitt Coleman and A
<b>Denis W. Loring</b>	Palm Beach Gardens, FL	RGA Reinsurance Com
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<b>Christian M. Milton</b>	Wynnewood, PA	Retired
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<b>Diane M. Nergaard</b>	Stamford, CT	Eriksen Enterprises, LI
<b>Barbara Niehus</b>	Skokie, IL	Niehus Actuarial Servi
<b>Robert J. O'Hare Jr.</b>	Weston, MA	Self-employed Attorne
<b>Constance D. O'Mara</b>	Medford, NJ	O'Mara Consulting, LL
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<b>Savannah Sellman</b>	San Francisco, CA	Duane Morris LLP
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<b>Radley D. Sheldrick</b>	Westborough, MA	Reinsurance Diversifie
<b>Richard E. Smith</b>	Westport, CT	NorthPort Advisors, In
<b>Timothy W. Stalker</b>	Blue Bell, PA	Nelson, Levine, de Luc
<b>J. Gilbert Stallings</b>	Hackensack, NJ	Retired
<b>Paul N. Steinlage</b>	Wausau, WI	Paul N. Steinlage, LLC
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<b>David W. Tritton</b>	Philadelphia, PA	Benfield Group
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<b>Theodore A. Verspyck</b>	Wilton, CT	Self-employed
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<b>Jeremy R. Wallis</b>	Basking Ridge, NJ	Self-employed Consult
<b>Andrew S. Walsh</b>	Berwyn, PA	Self-employed
<b>Paul Walther</b>	Lake Mary, FL	Reinsurance Direction
<b>Richard G. Waterman</b>	Minneapolis, MN	Northwest Reinsurance
<b>W. Mark Wigmore</b>	Simsbury, CT	Avalon Consulting, LLC
<b>Michael S. Wilder</b>	West Hartford, CT	Self-employed
<b>Eugene T. Wilkinson</b>	Warren, NJ	The Wilkinson Group,
<b>William A. Wilson</b>	Kingwood, TX	Wilson Advocacy and C
<b>W. Rodney Windham</b>	Tuscaloosa, AL	Alabama Reassurance
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**C**National Union Fire Ins. Co. of Pittsburgh, Pa. v.  
 Holt Cargo Systems, Inc.  
 S.D.N.Y.,2000.

Only the Westlaw citation is currently available.  
 United States District Court, S.D. New York.  
 NATIONAL UNION FIRE INSURANCE  
 COMPANY OF PITTSBURGH, PA, Petitioner,  
 v.  
 HOLT CARGO SYSTEMS, INC., Respondent.  
 No. 99 Civ. 3699(RCC).

March 28, 2000.

#### Opinion and Order

CASEY, J.

\*1 Petitioner National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "National Union") filed a Petition to Appoint an Arbitrator and an Umpire in connection with a series of demands for arbitration which it had served on respondent Holt Cargo Systems, Inc. (hereinafter "Holt"). National Union has provided Holt with insurance coverage for a number of years through a series of Indemnity Agreements (hereinafter the "Agreements"). Under the Agreements, the parties agreed to arbitrate all disputes or differences arising out of the interpretation of the Agreements. National Union objects to Holt's selection of a particular arbitrator on the grounds that the arbitrator is biased against National Union. Failing to agree on the selection of Holt's arbitrator, National Union also objects to the candidates for umpire suggested by Holt's arbitrator. National Union alleges that Holt's arbitrator did not act in good faith in selecting the candidates for umpire. National Union now requests that the Court select both an arbitrator and an umpire. National Union's petition is denied without prejudice with leave to reapply.

#### I. BACKGROUND

National Union is a Pennsylvania corporation with its principal place of business in the Southern District of New York. Holt is a Delaware corporation with its principal place of business in New Jersey. National Union has provided insurance coverage for Holt for a number of years, pursuant to the Agreements. This coverage includes, *inter alia*, worker's compensation,

longshoreman's and harbor workers' insurance and other employer's liability insurance.

The Agreements each contain an arbitration clause stating that:

[a]ll disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two (2) Arbitrators, one to be chosen by each party, and in the event the Arbitrators fail to agree to the decision of an Umpire to be chosen by the Arbitrators. The Arbitrators and Umpire shall be executive officials of Fire or Casualty Insurance or Reinsurance Companies other than the company or its affiliates; or an individual list in A .M. Best's *Recommended Insurance Attorneys* (latest available edition) or any individual recognized as an authority in insurance matters, such recognition evidenced by receipt of a Charter Property and Casualty Underwriter's Certificate. If the Arbitrators fail to appoint an Umpire, within one (1) month of a request in writing by either of them to do so, such Arbitrator or Umpire, as the case may be, shall at the request of either party be appointed by a justice of the supreme [sic] Court of the State of New York.

Petition to Appoint at pp. 3-4, ¶ 9. Although the arbitration clauses for some of the Agreements vary to a degree, it is undisputed that the Agreements all provide for disputes to be resolved by the two (2) arbitrators and one (1) umpire system described herein. One of the primary differences between the Agreements is the language outlining the qualifications of the arbitrator.

\*2 On or about January 8, 1999, National Union served eight Demands for Arbitration on Holt, relating to the Agreements covering the policy years February 1, 1988 to February 1, 1989 through March 9, 1994 to March 9, 1995. Petition to Appoint at p. 2, ¶ 7. On February 19, 1999, Holt appointed Robert L. Russell of Ernst & Young as its arbitrator. On March 1, 1999, National Union appointed Donald T. DeCarlo as its arbitrator. Shortly thereafter, National Union sought to challenge the appointment of Russell as Holt's arbitrator, based on alleged bias. In another arbitration on May 6, 1999 (the "May 6 Arbitration"), Russell had testified as an expert witness concerning National Union's conduct of its business. National Union claims that Russell's testimony at the May 6 Arbitration is "inconsistent with having an open mind in the present arbitration," and therefore, Russell

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Not Reported in F.Supp.2d  
Not Reported in F.Supp.2d, 2000 WL 328802 (S.D.N.Y.)  
(Cite as: Not Reported in F.Supp.2d)

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should be removed as Holt's appointed arbitrator. Petition to Appoint at p. 5, ¶ 15. National Union subsequently has agreed to reserve its objections to Russell and, if the parties determine that Russell is qualified as an arbitrator under any one of the Agreements, to conduct the arbitrations under a consolidated proceeding.

DeCarlo sent Russell a letter on April 2, 1999 requesting that an umpire be appointed, and Russell nominated two individuals. National Union alleges that neither of the candidates is qualified under the Agreements, but specifically challenges only one of Russell's candidates. National Union claims that Russell has failed to act in good faith because the individual nominated is a named partner of the law firm that served as co-counsel to the party opposing National Union at the May 6 Arbitration. The candidate is not alleged to have been a part of the team of lawyers that worked with Russell at the May 6 Arbitration. However, National Union contends that Russell and the candidate have some connection such that Russell's nomination of this individual indicates bad faith on the part of Russell.

National Union now petitions the Court to appoint an arbitrator and an umpire, given Russell's alleged bias against National Union and his corresponding bad faith in nominating another allegedly biased individual to serve as umpire.

## II. DISCUSSION

National Union's request to have an arbitrator appointed belies its desire to remove Russell as Holt's appointed arbitrator. Despite the fact that National Union agreed to reserve its objections concerning Russell's alleged partiality, National Union undauntedly proceeds to argue for his removal. The Court, however, will not consider National Union's end run around the established case law in this Circuit. Although the Federal Arbitration Act (hereinafter the "FAA") empowers the Court to vacate an award "[w]here there was evident partiality or corruption in the arbitrators" (9 U.S.C. § 10(a)(2) (1999)), the FAA does not provide for removal of an arbitrator prior to the rendering of an award.<sup>FN1</sup> See *Aviall, Inc. v. Ryder Systems, Inc.*, 110 F.3d 892, 895 (2d Cir.1997). In fact, the Court "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration

and the rendition of an award." *Aviall*, 110 F.3d at 895 (quoting *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414, n. 4 (2d Cir.1980)); *Alter v. Englander*, 901 F.Supp. 151, 153 (S.D.N.Y.1995).

FN1. Although there have been instances where courts have removed arbitrators prior to arbitration on account of partiality, these cases are inapposite because the removal was due to the invalidity of an arbitration agreement based on contract principles. See *Erving v. Virginia Squires Basketball Club*, 349 F.Supp. 716 (E.D.N.Y.), aff'd, 468 F.2d 1064 (2d Cir.1972); *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854 (S.D.N.Y.1982); *Cristina Blouse Corp. v. International Ladies Garment Workers' Union, Local 162*, 492 F.Supp. 508 (S.D.N.Y.1980).

\*3 Moreover, National Union overlooks the fact that "parties agree to arbitrate precisely because they prefer a tribunal with expertise regarding the particular subject matter of their dispute .... [and] [f]amiliarity with a discipline often comes at the expense of complete impartiality." *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir.1984) (citations omitted). Therefore, disqualifying an arbitrator because he or she had prior professional dealings with one of the parties would make it difficult at best, to find a qualified arbitrator at all. See *id.*; see also *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2d Cir.1981) (arbitrators are chosen because of experience in particular community, therefore some overlapping representation and interest inevitably results).

In light of the time that has passed since the dispute regarding Holt's appointment of Russell as an arbitrator arose, the Court directs the parties to resolve this matter expeditiously.<sup>FN2</sup> The parties have 30 days from the date of this opinion to report to the Court either that Russell has accepted his appointment or that a new arbitrator has been appointed. Given the nearly 15 months that have passed since National Union first served its Demands for Arbitration on Holt, the Court will view a failure to appoint an arbitrator in the additional 30 day period as a lapse in the naming of an arbitrator, pursuant to section 5 of the FAA. See 9 U.S.C. § 5

Westlaw.

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(1999); *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F.Supp. 907, 910 (S.D.N.Y.), aff'd, 578 F.2d 1366 (2d Cir.1978); *In the Matter of Arbitration Between Cravens, Dargan & Co., Pacific Coast v. General Ins. Co. of Trieste and Venice*, 1996 WL 41825 at \*2 (S.D.N.Y. Feb. 2, 1996).

FN2. As of the date of this opinion, the parties have not informed the Court whether Russell has accepted or declined the appointment as an arbitrator.

With regard to the appointment of an umpire, the parties are to select an umpire in accordance with the Agreements, within one week of the appointment of an arbitrator by Holt.

### III. CONCLUSION

For the aforementioned reasons, the petition to appoint an arbitrator and an umpire is denied without prejudice with leave to reapply.

S.D.N.Y.,2000.  
 National Union Fire Ins. Co. of Pittsburgh, Pa. v.  
 Holt Cargo Systems, Inc.  
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